

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Electronic Delivery of MVPD Communications)	MB Docket No. 17-317
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105
)	

REPLY COMMENTS



Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Mary C. Lovejoy
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 603-1735

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

March 5, 2018

TABLE OF CONTENTS

I.	INTRODUCTION & SUMMARY	1
II.	THE RECORD IN THIS PROCEEDING SUPPORTS THE MODERNIZATION OF THE SUBPART T SUBSCRIBER NOTICE REQUIREMENTS	3
A.	The Commission Should Adopt Proposals Designed to Increase Electronic Communications Between Cable Operators and Subscribers.	4
B.	The Commission Should Eliminate Outdated Requirements Related to Equipment Compatibility.....	6
III.	THE COMMISSION SHOULD ADOPT PROPOSALS FOR E-MAIL DELIVERY OF ELECTION NOTICES, SUBJECT TO CERTAIN MODIFICATIONS.....	8
A.	ACA Supports Proposals to Allow Broadcasters to Deliver Carriage Election Notices Via E-Mail, Subject to Certain Modifications.....	9
B.	The Commission Should Eliminate the Requirement to Send Notice to Every Cable System.	13
C.	The Commission Should Reject Proposals that Place New Unwanted Burdens on MVPDs.	14
IV.	THE COMMISSION SHOULD REJECT CALLS FOR CHANGES TO THE EXISTING DEFAULT CARRIAGE ELECTION	16
V.	CONCLUSION	19

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Electronic Delivery of MVPD Communications)	MB Docket No. 17-317
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105
)	

REPLY COMMENTS



I. INTRODUCTION & SUMMARY

The American Cable Association (“ACA”) hereby submits these comments in reply to comments filed in the above-captioned proceeding.¹ In the Notice of Proposed Rulemaking (“NPRM”), the Commission sets forth several tentative conclusions and proposals that would modernize its Subpart T rules related to both the delivery of required subscriber notices and other communications between cable operators and their subscribers and to the elimination of an outdated requirement to offer to supply to subscribers equipment that allows certain consumer devices to work compatibly with

¹ *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, 32 FCC Rcd 10755 (2017) (“NPRM”).

cable systems. The NPRM also seeks comment on whether electronic delivery of certain required subscriber notices should be permitted only on an “opt-in” basis; whether certain other notices could be posted on an operator’s website rather than delivered directly to subscribers; and whether and how a requirement to provide a “consumer education program” on equipment compatibility could be modernized.

Every commenting party that addressed these tentative conclusions and proposals expressed support for their adoption by the Commission, and many also agreed with ACA’s suggestions that other Commission rules highlighted in the NPRM should be modernized. Specifically, ACA urged the Commission to adopt a uniform “opt-out” approach to the e-mail delivery of subscriber notices, to allow cable operators to post subscriber notices to their website, and to eliminate entirely the outdated requirement to provide a consumer education program, rather than attempt to modernize it.

The NPRM also seeks comment on how to revise its rules related to the delivery of broadcast carriage election notices to multichannel video programming distributors (“MVPDs”).² In these reply comments, ACA expresses support for NCTA and Verizon’s proposals that would allow broadcasters to deliver carriage election notices to a single e-mail address provided by each MVPD (rather than sending a separate notice to every system), but ACA also proposes certain modifications to ensure that new procedures allow no uncertainty as to whether a broadcast station has met its obligations and to minimize burdens on MVPDs. Specifically, ACA proposes that broadcast stations be required to copy on their e-mail carriage election notice a Commission-hosted e-mail

² NPRM, ¶ 25.

address, which would then automatically generate a return receipt to both parties. Additionally, instead of requiring very small cable systems to establish online public folders solely to post their designated e-mail addresses for receiving carriage notices, the Commission should allow these systems to post their e-mail address in the Commission's Cable Operators and Licensing System ("COALS") database.

ACA urges the Commission to reject proposals proffered by large broadcasters that would allow television stations to post their notices in their online public files in lieu of sending them to MVPDs. This proposal would shift notification burdens from broadcast stations to MVPDs by forcing MVPDs to search through broadcast stations' online public inspection files. ACA further calls on the Commission to dismiss untimely calls to change the default election from must carry to retransmission consent – a proposal that would introduce new uncertainty into a process that has worked well for nearly twenty-five years.

II. THE RECORD IN THIS PROCEEDING SUPPORTS THE MODERNIZATION OF THE SUBPART T SUBSCRIBER NOTICE REQUIREMENTS

In its initial comments, ACA urged the Commission to modernize its Subpart T regulations, which require cable operators to provide subscribers with certain information about their service, by adopting the three proposals outlined in the NPRM. Specifically, the NPRM proposes first to "adopt a rule that would allow various types of generic written communications from cable operators to subscribers to be delivered electronically, if they are sent to a verified e-mail address and the cable operator complies with certain consumer safeguards;" second, to allow cable operators to respond to subscriber requests and complaints via e-mail when a subscriber has indicated that e-mail is their preferred communication; and third, to eliminate Section

76.1621's equipment compatibility offer requirement. The record in this proceeding overwhelmingly supports ACA's position that the Commission should adopt each of these proposals, and should take several other steps contemplated in the rulemaking to allow for greater flexibility in the manner in which subscriber notices could be delivered electronically and to eliminate Section 76.22, which requires cable operators to provide a consumer education program on equipment compatibility matters.

A. The Commission Should Adopt Proposals Designed to Increase Electronic Communications Between Cable Operators and Subscribers.

There is widespread consensus that the Commission should adopt its tentative conclusion to allow cable operators to deliver electronically to a verified e-mail address all of the Subpart T required subscriber notices,³ as well as the privacy notices required by Section 631 of the Communications Act, subject to certain consumer safeguards.⁴ All parties who commented specifically on this proposal expressed their support,⁵ and

³ NPRM, ¶¶ 6, 18.

⁴ These safeguards include a strict definition of "verified e-mail" and a requirement that cable operators provide a mechanism for subscribers to opt-out of e-mail delivery to receive paper notices. NPRM, ¶ 12.

⁵ See, e.g., *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket No. 17-317, Comments of NCTA – The Internet & Television Association at 2 (filed Feb. 15, 2018) ("NCTA Comments") ("[W]e support the Commission's tentative conclusion that operators should be allowed to use verified e-mail for other notice requirements."); Comments of Verizon at 1 (filed Feb. 15, 2018) ("Verizon Comments") ("Consistent with today's consumer preferences, the Commission should authorize [MVPDs] to deliver routine subscriber notices electronically."); Comments of DISH Network L.L.C. at 1 (filed Feb. 15, 2018) ("DISH Comments") ("In particular, DISH supports the Commission's proposal to allow subscriber privacy notifications ... to be delivered electronically to a verified e-mail address, subject to consumer safeguards."); Comments of AT&T at 2 (filed Feb. 15, 2018) ("AT&T Comments") ("AT&T urges the Commission to adopt its tentative conclusion that cable operators, DBS providers, and Open Video System (OVS) providers should be permitted to delivery privacy notifications to subscribers via verified email addresses."); Comments of NTCA – The Rural Broadband Association at 3 (filed Feb. 15, 2018) ("NTCA Comments") ("NTCA supports the Commission's proposal to update its rules to allow for updated communications methods[.]"). NTCA also notes that permitting subscriber notices to be delivered via e-mail would be particularly helpful to "small, rural MVPDs where it is not unusual to find the same employee preparing annual MVPD notices, addressing equipment repairs, and responding to surveillance requests from law enforcement officials." NTCA Comments at 3. ACA wholeheartedly agrees.

several others supported the use of electronic communications more generally.⁶ No commenting parties objected. Like ACA, commenters also urged the Commission to allow cable operators to rely on website posting as part of its electronic delivery, as long as cable operators inform subscribers that the notices exist and direct them to where the material can be found.⁷

The initial comments also show that there is universal support for allowing all required subscriber notices to be delivered to a verified e-mail address on an “opt-out” basis,⁸ rather than requiring subscribers to “opt-in” to electronic delivery of notices required by Section 16.1603 (rate and service changes), 16.1604 (charges for customer service changes), 16.1618 (basic tier availability), and Section 631 of the Act (privacy). Commenters generally agree with ACA that there is “no justification for allowing electronic delivery of certain notices only on an opt-in basis,”⁹ and that “subscribers

⁶ See, e.g., *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket No. 17-317, Comments of Nexstar Broadcasting, Inc. at 2 (filed Feb. 15, 2018) (“Nexstar Comments”) (“[E]lectronic delivery or email delivery would provide broadcasters with the same reduced expenses and increased efficiency as sought by the MVPDs with respect to their required subscriber notices. Advantages that the Commission recently acknowledge and provided to MVPDs in the context of communication with their subscribers as required under 47 C.F.R. 76.1602 and 47 C.F.R. 76.1703.”); Joint Comments of CBS Corporation et al. at 8 (filed Feb. 15, 2018) (“Joint Broadcast Commenters Comments”) (“[T]he Commission should modernize its rules so that notice can be provided electronically”).

⁷ ACA Comments at 6; NCTA Comments at 2-3 (“In lieu of providing bill inserts or additional electronic notices, the Commission should grant operators more flexibility to point customers to the operator’s websites where customers can easily locate the most current, customized information”); Verizon at 4 (“Verizon agrees that providing an electronic link to a notice within the email is a reasonable method of delivering the notice itself.”); NTCA Comments at 3 (“NTCA further recommends that the Commission allow MVPDs to send email notices to subscribers who have a verified email address, containing a link to the MVPD’s notice on its website.”).

⁸ See, e.g., AT&T Comments at 4 (“AT&T urges the Commission to extend the opt-out framework adopted in the 2017 Declaratory Ruling to [privacy notices].”); Verizon Comments at 5 (“An ‘opt-in’ to electronic delivery is not necessary for delivery of the notices required by Section 16.1603 (rate and service changes), 16.1604 (charges for customer service changes), 16.1618 (basic tier availability), and Section 631 of the Act (privacy).”).

⁹ ACA Comments at 6; NCTA Comments at 4 (“There is no policy reason to erect new barriers to providing these additional notices electronically in the form of an ‘opt-in’ requirement. The Commission

benefit from a consistent approach to the delivery of electronic notices.”¹⁰ Again, no parties objected to this approach.

Similarly, commenters support the adoption of the NPRM’s proposal to allow cable operators to respond to consumer requests or billing dispute complaints by e-mail when the consumer used e-mail to make the request or complaint, or the consumer specifies e-mail as their preferred delivery method.¹¹ No commenters have objected to either of these proposals.

B. The Commission Should Eliminate Outdated Requirements Related to Equipment Compatibility.

In its initial comments, ACA explained that two current Commission rules related to the compatibility of consumer equipment with cable systems – Sections 76.64(h)¹² and 76.66(d)¹³ – are obsolete and should be therefore be eliminated.¹⁴ These rules were adopted to help resolve certain compatibility problems that consumers faced when

previously rejected this approach, finding that ‘petitioners argue persuasively that it would not be workable for cable operators to attempt to receive permission from each individual customer prior to initiating electronic delivery.’); Verizon Comments at 5 (“The ‘nature’ of these notices is not any different than the nature of the other notices discussed in the NPRM, and should not require opt-in for approval.”).

¹⁰ ACA Comments at 6; NCTA Comments at 4-5 (“Requiring an opt-in regime for certain electronic notices and different treatment for others would unnecessarily inject confusion and complication into what otherwise is intended to be an effort to simplify, streamline, and modernize the process.”); Verizon Comments at 6 (“A uniform ‘opt-out’ mechanism for all these notices benefits consumers with a consistent user experience.”).

¹¹ NPRM, ¶ 19. NCTA Comments at 10 (“We strongly support the Commission’s proposal to allow cable operators to respond to consumer requests or billing disputes by e-mail (unless the consumer expressly specifies a different preferred delivery method.”); Verizon Comments at 10 (“The Commission should adopt its proposal to allow MVPDs to respond by email to consumer complaints and inquiries when the consumer uses email, or agrees to use email, to communicate with the MVPD.”).

¹² 47 C.F.R. § 76.1621 (requiring cable operators to offer and provide upon request to subscribers “special equipment that will enable the simultaneous reception of multiple signals”).

¹³ 47 C.F.R. § 76.1622 (requiring cable operators to provide a consumer education program on equipment and signal compatibility matters).

¹⁴ ACA Comments at 8-10.

attempting to use video cassette recorders and certain features on TV receivers with their cable service. Commenters agree with ACA that these rules are no longer necessary, as consumers no longer rely on such equipment to record linear television or to activate “picture-in-picture” functionality.¹⁵ Recognizing that such technology has become obsolete, the Commission proposes to eliminate Section 76.1621,¹⁶ and seeks comment on how it could modernize Section 76.1622 to better reflect today’s technology.¹⁷

ACA agrees with other commenters that the Commission should eliminate both requirements altogether, but to the extent that the Commission feels that some form of consumer education program is necessary, ACA reiterates that the Commission should adopt less prescriptive requirements regarding the content of such notices and allow cable operators to satisfy their subscriber notice requirements by including such “information on websites so that those customers interested in the information would be able to obtain it easily.”¹⁸

Overall, the record overwhelming demonstrates that it is time to modernize the Commission’s Subpart T requirements by allowing greater electronic communications between cable operators and subscribers. ACA therefore urges the Commission to

¹⁵ NCTA Comments at 11 (“At the time this rule was adopted, more than 100 million households had VCRs, and more than 2 million units were sold in 1994 alone. Today, VCRs are no longer being manufactured. This rule no longer serves any legitimate purpose and should be eliminated.”); Verizon Comments at 10 (“The Commission should eliminate Section 76.1621 and 76.1622. These rules require notices to subscribers of compatibility between cable systems and TV receiver and video recording equipment from 1992 – pre-DTV, pre-digital cable systems, pre-CableCARD, pre-DVR, and pre-video apps – in other words, prehistoric from the standpoint of 2018.”).

¹⁶ NPRM, ¶ 22.

¹⁷ *Id.*, ¶ 23.

¹⁸ NCTA Comments at 12.

adopt the tentative conclusions outlined in the NPRM, and to further adopt the proposals set forth by ACA and others, as described above.

III. THE COMMISSION SHOULD ADOPT PROPOSALS FOR E-MAIL DELIVERY OF ELECTION NOTICES, SUBJECT TO CERTAIN MODIFICATIONS

In the NPRM, the Commission seeks comment “on how to revise Sections 76.64(h) and 76.66(d) of [its] rules to permit television broadcast stations to use alternative means of notifying MVPDs about their carriage elections.”¹⁹ ACA generally supports the Commission’s attempts to modernize its media regulations,²⁰ and understands the burden of time and money that the Commission’s various notice requirements impose.²¹ For that reason, ACA does not object to the electronic delivery of carriage election notices in principle, but as explained in its comments, any change in the election process must ensure that new procedures: 1) allow for no uncertainty as to whether a cable operator has received timely notice of the broadcaster’s designation; and, 2) do not impose any regulatory burdens on MVPDs.²² ACA believes that the broadcast carriage election rules can be modernized in a manner that will reduce the burden on broadcasters while also conforming to these principles. Specifically, ACA suggests that the Commission adopt a modified version of the procedures recommended by other MVPD commenters related to e-mail delivery of carriage election notices. In adherence to these principles, ACA also calls for the Commission to

¹⁹ NPRM, ¶ 25.

²⁰ ACA Comments at 11.

²¹ *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket No. 17-317, Comments of the National Association of Broadcasters at 3 (filed Feb. 15, 2017) (“NAB Comments”); see also Nexstar Comments at 3 (“Under the current Election Rules meeting this requirement involves tremendous time and resources from broadcasters[.]”).

²² ACA Comments at 11.

reject the broadcasters' alternative approach of posting their carriage election notices in their public files because this proposal thrusts new, unwarranted burdens on MVPDs.

A. ACA Supports Proposals to Allow Broadcasters to Deliver Carriage Election Notices Via E-Mail, Subject to Certain Modifications.

ACA has previously expressed concerns that e-mail delivery of carriage election notices could lead to uncertainty as to whether a broadcaster has met its obligations to send notice to MVPDs in a timely manner, but ACA believes this issue could be resolved by amending the carriage election rules, as proposed by NCTA and Verizon, to require broadcast stations to deliver their carriage election notices to an e-mail address designated by the MVPD for such purpose, with a few additional modifications. First, ACA proposes that a station be required to copy on its carriage election e-mails an independent third party who can verify that the broadcaster has sent the notice in a timely manner to an appropriate e-mail address. ACA suggests that the Commission serve as this independent third party by establishing an e-mail address that broadcasters must copy on all of their e-mail notices to cable operators. For the convenience of broadcasters, the Commission could then confirm receipt of the broadcaster's e-mail notification through an automatic response to both the e-mail address used by the broadcaster to send its notice and to the e-mail address identified by the MVPD to which the notice was sent. Since the Commission would be providing the return receipt, there would be no reason for the MVPD to be burdened with the task of doing so as well.²³

²³ There is presently no requirement for cable operators to provide confirmation to broadcasters that their notice was received, and ACA does not believe that cable operators, particularly smaller ones, should be saddled with any new unwanted requirements, particularly as part of a proceeding designed to lessen regulatory burdens.

Second, to ensure that broadcasters are aware of the e-mail address to which they should send their carriage election notices, ACA does not object to NCTA's proposal to require cable operators to designate an e-mail address that would serve as a single point of contact for all cable systems served by that operator.²⁴ This e-mail address could be posted to each cable system's online public inspection file, where it can be easily accessed by broadcast stations, as NCTA proposes. To make it as easy as possible for broadcast stations to find each cable operator's dedicated e-mail address, ACA recommends that the e-mail address be posted prominently on the first page of each system's online public file. For those cable systems that are exempt from the Commission's online public inspection file rules, ACA suggests that operators of these systems be permitted to post their dedicated e-mail address in the Commission's COALS database, where it can be found quickly and easily on the same page as each system's legal name and address. With ACA's proposed accommodation for small cable systems, providing a dedicated e-mail address would be minimally burdensome for all cable operators.

Allowing broadcasters to provide carriage notices to cable operators via e-mail consistent with NCTA's and Verizon's proposal, subject to ACA's additional suggested modifications, has many benefits for broadcasters and cable operators alike. First, as stated by Nexstar, "email delivery would provide broadcasters with the same reduced expenses and increased efficiency as sought by the MVPDs in the context of communications with their subscribers."²⁵

²⁴ NCTA Comments at 13.

²⁵ Nexstar Comments at 5.

Second, it provides a mechanism for determining whether a broadcaster has indeed met its obligation to send its carriage election notice by a specific deadline and to the proper e-mail address, regardless of whether the notice is actually received by the cable operator. In its initial comments, ACA expressed concern about the means of determining whether an e-mail was properly sent if it becomes lost in transit for any reason.²⁶ The benefit of certified mail is that is that an independent party – the United States Postal Service – provides a record of the specific date on which the broadcast station sent the carriage election notice, and allows the sender to track the notice’s progress towards delivery. Copying a Commission-hosted e-mail address when sending out an election notice would effectively serve the same purpose. It would allow parties in dispute over whether a notice was properly sent to check with the Commission to determine when such notice was sent, as well the specific e-mail address that the notice was sent to by the broadcaster and the contents of the notice. Accordingly, the Commission could provide a means of establishing verifiable certainty over whether notice was properly sent by broadcasters, while still relieving broadcasters of the significant costs associated with delivering notices via certified mail.²⁷ Copying a dedicated Commission-hosted e-mail address imposes no additional burdens on broadcasters.

Third, it alleviates one of NAB’s primary concerns – namely, that delivery receipts are often unreturned, such that broadcasters have no way of knowing whether their

²⁶ ACA Comments at 12-13.

²⁷ Nexstar estimated that during the 2017 election cycle, it spent more than \$38,000 on certified mail fees. Nexstar Comments at 3. E-mail delivery reduces this cost to \$0.

notices have been received.²⁸ Because the Commission-hosted e-mail address could automatically generate a return receipt, broadcasters would be at least as confident as they are today that, as long as they received a response from the Commission, used the proper e-mail address for the cable operator, and provided all required information, they have met their obligation.²⁹ To the extent that the cable operator does not receive the notice for reasons beyond the broadcaster's control, the broadcaster would have a means of proving it was not at fault.

Fourth, it is minimally burdensome on cable operators. Although cable operators would be saddled with a new obligation to designate an e-mail address that broadcasters would use to send their electronic notices, it imposes no other new obligation on cable systems.

NAB objects to NCTA and Verizon's proposals to require broadcasters to send e-mail notice to an e-mail address identified by each MVPD for that purpose on the grounds that it does not eliminate the need for broadcasters to "confirm which cable systems are in their communities."³⁰ As such, NAB contends that "broadcasters would still need to pay for Nielsen data, compare the Commission's Cable Operations and Licensing System (COALS) data with other publicly available information, hire outside legal counsel and devote significant internal resources."³¹ It is unclear to ACA why

²⁸ NAB Comments at 9.

²⁹ Likewise, if the broadcaster does not receive an immediate response from the Commission acknowledging receipt of the station's e-mailed carriage notice, they would know further action on their part is necessary.

³⁰ *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket No. 17-317, Reply Comments of the National Association of Broadcasters at 3 (filed Mar. 2, 2018).

³¹ *Id.*

broadcasters currently waste so much time and money trying to identify cable systems in their market. Each station should have the necessary information on record already, as any cable system that begins service in a market is required, by Commission rules, “to notify all local commercial and noncommercial broadcast stations of its intent to commence service.”³² Since broadcast stations make these same elections every three years, it defies belief to suggest that broadcast stations do not maintain records of the information received from systems in their markets as part of their regular course of business. Additionally, broadcast stations that elect retransmission consent have to communicate with MVPDs for the purpose of negotiating agreements, so it should be no additional hardship for a broadcaster to identify the correct address to which it should send its election notice. Regardless, to the extent that stations have not been able to retain such records, the proposal above still provides significant relief by eliminating printing and delivery costs altogether.

B. The Commission Should Eliminate the Requirement to Send Notice to Every Cable System.

ACA also supports NCTA’s proposal to allow each broadcast station to send a single e-mail to the relevant cable operators in its Designated Market Area (“DMA”), rather than requiring separate notices to be sent to each cable system on which the station is seeking carriage.³³ NCTA’s proposal will streamline the process and provide significant relief to broadcast stations by allowing them to meet their notice obligations by sending a single e-mail notice that identifies each system for which they are making a carriage election, rather than dozens of letters. This streamlined process will also

³² 47 C.F.R § 76.64(k).

³³ NCTA Comments at 13-14.

significantly reduce the amount of research that a broadcast station must do to determine where its election notices must be sent, since it need only identify one e-mail address for each MVPD. If the Commission adopts ACA's suggestion that the dedicated e-mail address be posted prominently on the first page of each cable system's online public inspection file and a comparable location in smaller systems' COALS profiles, the process of identifying such e-mail addresses will be minimally burdensome for broadcast stations.³⁴ The proposal will also benefit cable operators by reducing the number of notices that they must process.

C. The Commission Should Reject Proposals that Place New Unwanted Burdens on MVPDs.

While allowing broadcast stations to deliver a single carriage election notice via e-mail to each cable operator benefits broadcasters and cable operators alike, other methods of electronic delivery proposed by commenters merely shift burdens from broadcast stations to MVPDs, and should therefore be rejected. In particular, ACA objects strongly to proposals that would effectively eliminate broadcasters' obligation to provide election notices to MVPDs, instead forcing MVPDs to look up each station's carriage election in the station's online public file.³⁵ ACA is not alone in its objection.

³⁴ In its comments, NAB implies that accessing the Commission's online public file database is as simple as "opening a piece of mail." NAB Comments at 7. As discussed below, ACA disputes that notion, especially as it relates to the multiple steps required to find a broadcast station's carriage election notice. Nonetheless, ACA's proposal is designed to make the process of identifying MVPDs' e-mail addresses as easy as possible for broadcasters, and on the whole the process proposed by ACA decreases the overall burdens of the current election process. To the extent that minimal burdens remain, they are more properly borne by broadcast stations, who are the intended and actual beneficiaries of the retransmission consent and must carry rules, rather than the MVPDs, for whom the notice serves to inform them of their responsibilities with respect to each station.

³⁵ See NAB Comments at 2 ("The FCC can accomplish [its] goals by permitting broadcasters to satisfy the Commission's notice requirement by placing their carriage elections in online public files."); Joint Broadcast Commenters Comments at 8-9 ("[T]he Commission could allow carriage election notices to be uploaded to stations' public files, rather than sent by certified mail to each cable system.").

MVPD commenters agree that shifting the burden to MVPDs is “unwarranted and inequitable”³⁶ and “[n]otice of a broadcast election via public file upload alone would be unworkable for MVPDs, as it would require many MVPDs to search hundreds of public files for new election requests.”³⁷

NAB’s claim that its proposal to rely solely on broadcasters’ public file to notify MVPDs of each station’s carriage election does not shift burdens to MVPDs is patently false.³⁸ NAB apparently believes that accessing each individual broadcast station’s public inspection file using the Commission’s Online Public Inspection File database is as simple as “opening a piece of mail.”³⁹ Finding a carriage election notice in a broadcast station’s public file is not simply a matter of “access[ing] a website.”⁴⁰ First, an MVPD must search for each individual station in its DMA by going to the FCC’s Online Public Inspection File website at <https://publicfiles.fcc.gov>. Once there, the user must search for the broadcast station using its call sign, and then click one link to identify the appropriate “Broadcast Stations TV” (as opposed to, in some cases, AM Radio stations that share the same call sign) station, then yet another to get to its “TV Station Information.” Next, the user must actively search through the station’s online public file, as election notices are not linked or prominently displayed as a unique category on its landing page. Once the user has identified and clicked through the “More Public Inspection Files” icon on this first page, they must then scroll through up to

³⁶ AT&T Comments at 6.

³⁷ DISH Comments at 6.

³⁸ NAB Comments at 7.

³⁹ *Id.*

⁴⁰ *Id.*

fourteen different types of notices to find the folder in which carriage election notices are posted. Finally, it must open one or more files that contain as many as dozens of election notices for all MVPDs in the market, and then scroll through the PDF for the notice that applies to the MVPD doing the scrolling. While posting carriage notices in an online public file may be less burdensome for a broadcaster than sending such notices to MVPDs via certified mail, it takes significantly more effort for MVPDs to access these notices when compared to opening a piece of mail. This added burden would be multiplied by dozens or hundreds for MVPDs that carry stations in multiple DMAs.

While ACA appreciates the Joint Broadcasters' efforts to ensure that "cable operators no longer would have to receive and process certified letters from every station at each individual system that the operator owns in the market,"⁴¹ the proposals that ACA outlines above would also eliminate the burden of receiving multiple carriage election notices, while imposing only a minimal burden on cable operators and broadcasters alike.⁴² Allowing e-mail delivery to a single e-mail address that can be independently verified to the Commission represents an equitable compromise that reduces the burden on broadcasters while appropriately balancing MVPDs' needs.

IV. THE COMMISSION SHOULD REJECT CALLS FOR CHANGES TO THE EXISTING DEFAULT CARRIAGE ELECTION

Multiple broadcast commenters have asked the Commission to take the extraordinary step of revising its rules "such that the default election for commercial

⁴¹ Joint Broadcast Commenters Comments at 8.

⁴² Undoubtedly, broadcasters would prefer a carriage election process that would relieve them of all burdens entirely. AT&T reminds us in its comments that "[a]s the beneficiary of a government granted right, the burden should remain on broadcasters to ensure that [MVPDs] receive their notices. [MVPDs] should not have to hunt for them." AT&T Comments at 6-7.

stations in the absence of affirmatively delivering notice to a cable system would be for retransmission consent, not an election for must carry.”⁴³ As a threshold matter, it would be improper for the Commission to consider the broadcasters’ proposal at this time, as it was not properly noticed in the NPRM. Perhaps more importantly, however, changing the default from must carry to retransmission consent would unnecessarily insert uncertainty and confusion into a process that has worked well for nearly twenty-five years.

According to the proponents of this proposal, the main benefit of reversing the election default would be to decrease the number of notices that must be delivered to MVPDs.⁴⁴ Thus, large broadcasters have effectively announced that, if the default is changed, they will cease providing MVPDs with their carriage election notices altogether. So, as with the proposal to allow broadcasters to rely entirely on posting election notices to their public file, large broadcasters are asking the Commission to eliminate entirely their obligation to deliver notice to MVPDs of their carriage election. While, again, these large broadcasters would surely prefer to be relieved of their regulatory burdens, effectively eliminating notice requirements altogether for stations

⁴³ Joint Broadcast Commenters Comments at 2; see also *Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative*, MB Docket No. 17-317, Comments of Meredith Corporation at 1 (filed Feb. 15, 2018) (“Meredith agrees that the FCC should harmonize the cable at satellite rules to set the default election at retransmission consent. That is, if written notice is not provided, the parties would default to retransmission consent (and not must carry).”); Nexstar Comments at 8 (“Nexstar also urges the Commission to reclassify the default election for cable to retransmission consent instead of must carry.”); NAB Comments at 2 (asking the Commission to “modif[y] its default so that if a broadcaster fails to make a carriage election for a cable system, it defaults to retransmission consent rather than must-carry.”).

⁴⁴ See Nexstar Comments at 8 (“A change in the default election would significantly reduce the number of election notices distributed to the carriers, thus reducing the administrative burdens and costs associated with broadcasters distributing them and carriers cataloging the notices.”); Joint Broadcast Commenters Comments at 6 (“While cable operators would continue to receive some election notices, including those for commercial stations electing must-carry status, the volume of notices would decrease substantially.”).

that prefer retransmission consent to must carry would lead to uncertainty and confusion, and could create additional work for cable operators and must carry stations, most of whom are small and lack the resources of their larger competitors.⁴⁵ In contrast, the proposals that ACA has laid out above⁴⁶ will go a long way to alleviate the burdens associated with the current carriage election process without creating uncertainty and confusion.

In support of its argument in favor of reversing the current carriage election default, NAB also makes the bizarre claim that “flipping the default would alleviate ACA’s stated concern about broadcasters that fail to provide notice automatically burdening cable operators by their default must-carry status.”⁴⁷ NAB does not specify exactly what concern ACA has “stated,” but it does claim that “any increase in must-carry stations would (allegedly) strain small providers’ resources, as they must be able

⁴⁵ For example, in many cases cable operators desire to carry some stations, including public television stations, who elect must carry, most of whom are small, independent stations with few resources. If such a station fails to meet its carriage election obligation, as they are more likely than their larger counterparts to do, both the cable operator and station would have to expend resources to enter into a retransmission consent agreement that allows continued carriage. No matter how simple and straightforward that process may seem to a large broadcaster who is used to negotiating hundreds of retransmission consent agreements, for small cable operators and small broadcasters the process would be very time consuming and costly, even if the ultimate terms of the agreement are simple. Additionally, there is new risk that cable operators may inadvertently violate both retransmission consent rules and copyright law by inadvertently carrying a station without retransmission consent because such station previously elected must carry but this time failed to send any carriage notice. Moreover, requiring stations electing must-carry to send carriage election notices, when many of these stations have not sent such notices for many cycles, will result in many imperfect notices over at least the next two election cycles, creating uncertainty for the stations sending the notice and for the MVPDs receiving them. It will also likely impose burdens on the Commission who will likely have to rule on more disputes over whether notice was properly sent. Further, today many broadcasters include in their retransmission consent election notices contact information for an individual representing the station, which provides helpful information for cable operators when they are seeking to initiate retransmission consent negotiations with the station. If broadcasters seeking retransmission consent did not need to send a notice, then cable operators would be burdened with having to obtain this information through alternative means.

⁴⁶ See *supra* at 7-14.

⁴⁷ NAB Comments at 8.

to know with certainty how many broadcasters they will be required to carry.”⁴⁸ NAB’s argument here is not entirely clear, but ACA understands it to be suggesting that ACA members should support NAB’s proposal because it might provide an opportunity to drop must carry stations who fail to meet their election notice requirements. While ACA believes the Commission should take certain actions to provide relief to capacity constrained systems, such as limiting the forced bundling demands of must-have broadcasters and cable networks,⁴⁹ changing the default carriage of the broadcast carriage notification rules because some small, resource constrained, must carry stations are likely to improperly elect carriage is not one of them. NAB appears to acknowledge implicitly that its proposal will impose increased notification burdens on small broadcasters, and that some of these stations will make improper elections as a result, perhaps resulting in the stations and their viewers losing carriage. In this sense, NAB has actually highlighted one of the best reasons for the Commission to maintain the status quo – to protect small, independent stations who lack the resources to demand carriage in exchange for high retransmission consent fees.

V. CONCLUSION

For the reasons stated above, the Commission should adopt its proposal to permit cable operators to deliver all Subpart T subscriber notices and privacy notices to a verified e-mail address, subject to certain consumer safeguards, and to allow all such notices to be sent on an “opt-out” basis. The Commission should also allow cable operators further flexibility to meet their subscriber notice obligations by posting such notices on their website, and should eliminate

⁴⁸ *Id.*

⁴⁹ *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Joint Reply Comments of The American Cable Association et al. at 12 (filed Feb. 22, 2017).

both Sections 76.1621 and 76.1622 of the Commission's rules, which relate to outdated equipment compatibility requirements. With respect to broadcast carriage election notices, the Commission should require broadcast stations to deliver their notices to each MVPD in their DMA to a dedicated e-mail address identified by each MVPD for such purpose. Each MVPD should post such an e-mail address in each of its systems' online public inspection files, or if the system is exempt from the public inspection file requirement, in its COALS profile. ACA also proposes that broadcast stations be required to copy a Commission-hosted e-mail address on each e-mail notice. The Commission should reject calls to allow broadcast stations to fulfill their notice requirement by simply posting their election notices in their online public inspection files. Finally, the Commission should reject calls to amend the existing carriage election default from must carry to retransmission consent.

Respectfully submitted,



Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Mary C. Lovejoy
Vice President of Regulatory Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 603-1735

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

March 5, 2018